

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
Federal-State Joint Board on)
Universal Service:) CC Docket No. 96-45
Promoting Deployment and)
Subscribership in Unserved)
and Underserved Areas, Including)
Tribal and Insular Areas)

FURTHER NOTICE OF PROPOSED RULEMAKING

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By the Commission: Commissioner Furchtgott-Roth approving in part, dissenting in part, and issuing a statement; Commissioner Tristani issuing a statement.

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I. INTRODUCTION

1. An important goal of the Telecommunications Act of 1996¹ is to preserve and advance universal service in a competitive telecommunications environment.² The 1996 Act mandates that "consumers in all regions of the Nation, including low-income consumers and

¹ See Pub. L. No. 104-104, 110 Stat. 56 (1996) (1996 Act), amending the Communications Act of 1934, 47 U.S.C. § 151, *et seq.*, (the Act).

² 47 U.S.C. § 254(b).

those in rural, insular, and high[-] cost areas, should have access to telecommunications and information services”³ Congress also directed that the support mechanisms employed by the Commission for this task should be “specific, predictable and sufficient.”⁴ Through decisions adopted over the past two years, the Commission has been striving to ensure that federal universal service support mechanisms for high-cost areas, low-income consumers, schools and libraries, and rural health care providers, enable consumers to obtain telecommunications services that would otherwise be prohibitively expensive.⁵

2. The absence of telecommunications service in a home puts its occupants at a tremendous disadvantage in today’s society. Parents cannot be reached when urgent situations arise at school. Job seekers cannot offer prospective employers a quick and convenient means of communication. People in immediate need of emergency services cannot contact police departments, fire departments, or medical providers. In short, telephone service provides a vital link between individuals and society as a whole. Given the importance of telephone service in modern society, it is imperative that the Commission take swift and decisive action to promote the deployment of facilities to unserved and underserved areas and to provide the support necessary to increase subscribership in these areas.

3. The Commission took additional steps in the Thirteenth Order on Reconsideration toward realizing Congress’s goal of bringing telecommunications services to all regions of the nation.⁶ Specifically, in consultation with the Federal-State Joint Board on Universal Service (Joint Board), we adopted the framework for a new, forward-looking high-cost support mechanism for non-rural carriers.⁷ This new high-cost support mechanism is intended to ensure

³ 47 U.S.C. § 254(b)(3).

⁴ 47 U.S.C. § 254(b)(5). *See also* 47 U.S.C. § 254(d).

⁵ *Federal-State Joint Board on Universal Service*, Notice of Proposed Rulemaking and Order Establishing a Joint Board, 11 FCC Rcd 18092 (1996) (*May 1996 Notice*); Recommended Decision, 12 FCC Rcd 87 (Jt. Bd. 1996) (*First Recommended Decision*); Report and Order, CC Docket No. 96-45, 12 FCC Rcd 8776 (1997), as corrected by Errata, CC Docket No. 96-45 (rel. June 4, 1997) (*First Report and Order*); Order on Reconsideration, 12 FCC Rcd 10095 (1997); Second Order on Reconsideration, 12 FCC Rcd 18400 (1997); Third Order on Reconsideration, 12 FCC Rcd 22801 (1997); Fourth Order on Reconsideration, 13 FCC Rcd 2372 (1997); Fifth Order on Reconsideration, 13 FCC Rcd 14915 (1998); Order and Order on Reconsideration, 13 FCC Rcd 13749 (1997); Second Recommended Decision, 13 FCC Rcd 24744 (1998); Sixth Order on Reconsideration, 13 FCC Rcd 22908 (1998); Seventh Order on Reconsideration, 13 FCC Rcd 19397 (1998); Eighth Order on Reconsideration, 13 FCC Rcd 25058 (1998); Ninth Order on Reconsideration, 14 FCC Rcd 377 (1998); Tenth Order on Reconsideration, FCC 99-46 (rel. Apr. 2, 1999); Eleventh Order on Reconsideration, FCC 99-49 (rel. May 28, 1999); Twelfth Order on Reconsideration, FCC 99-121 (rel. May 28, 1999); Thirteenth Order on Reconsideration, FCC 99-119 (rel. May 28, 1999); *affirmed in part, remanded in part and reversed in part*, *Texas Office of Public Utility Counsel v. FCC*, No. 97-60421 (5th Cir. Jul. 30, 1999).

⁶ *Thirteenth Order on Reconsideration*, *supra* n. 5.

⁷ This new support mechanism has a two-part methodology that considers both the relative costs of providing supported services and the states’ ability to support those costs using their own resources. *Thirteenth Order on Reconsideration*, FCC 99-119 at paras. 47-78. In the first step of the methodology, the costs incurred by a non-rural carrier to provide supported services are estimated using a single national model based on forward-looking costs. *Thirteenth Order on Reconsideration*, FCC 99-119 at paras. 49-54. Those costs are then compared to a national cost benchmark to determine which areas have costs that exceed the benchmark, and are therefore in need of support. *Thirteenth Order on Reconsideration*, FCC 99-119 at paras. 61-62. In the second step of the methodology, the state’s ability to achieve reasonably comparable rates using its own resources is estimated by multiplying a fixed dollar amount by the number of lines served by non-rural carriers in the state. *Thirteenth Order on Reconsideration*, FCC

that high-cost areas receive support that is specific, predictable, and sufficient, even as local competition develops. Moreover, we believe that the forward-looking methodology, as opposed to a methodology based on book costs, will encourage efficient entry and investment in high-cost areas because forward-looking costs drive market decisions.

4. In addition to adopting the methodology for the new high-cost support mechanism for non-rural carriers, the Thirteenth Order on Reconsideration also sought comment on certain issues regarding the implementation of the new mechanism.⁸ The Commission intends to resolve these implementation issues in the fall of 1999, so that the new high-cost support mechanism will begin providing support to non-rural carriers beginning on January 1, 2000.⁹ In addition, the Commission reaffirmed its intention that rural carriers¹⁰ will receive support based on the forward-looking costs of providing supported services, but not before January 1, 2001, and only after further review by the Commission, the Joint Board, and a Rural Task Force appointed by the Joint Board.¹¹ In the meantime, rural carriers will continue to receive high-cost support based on the existing mechanism until the Commission adopts an appropriate forward-looking mechanism for determining rural support.¹²

5. The Commission has also recognized that, despite the steps it had taken to achieve the universal service goals of the 1996 Act, some areas of the nation remain unserved or

99-119 at paras. 63-66. The federal support mechanism will provide support for costs that exceed both the national benchmark and the individual state's resources to support those costs. *Thirteenth Order on Reconsideration*, FCC 99-119 at para. 11, 65-66.

⁸ *Thirteenth Order on Reconsideration*, FCC 99-119 at para. 95.

⁹ *Thirteenth Order on Reconsideration*, FCC 99-119 at para. 19.

¹⁰ *Thirteenth Order on Reconsideration*, FCC 99-119 at para. 3. Section 3(37) of the 1996 Act defines a Rural Telephone Company as a local exchange carrier operating entity to the extent that such entity –

(A) provides common carrier service to any local exchange study area that does not include either –

(i) any incorporated place of 10,000 inhabitants or more, or any part thereof, based on the most recently available population statistics of the Bureau of the Census; or

(ii) any territory, incorporated or unincorporated, included in an urbanized area, as defined by the Bureau of the Census as of August 10, 1993;

(B) provides telephone exchange service, including exchange access, to fewer than 50,000 access lines;

(C) provides telephone exchange service to any local exchange carrier study area with fewer than 100,000 access lines; or

(D) has less than 15 percent of its access lines in communities of more than 50,000 on the date of enactment of the Telecommunications Act of 1996.

¹¹ *Thirteenth Order on Reconsideration*, FCC 99-119 at paras. 21, 129. See also *First Report and Order*, 12 FCC Rcd at 8889, 8910, 8917-18; *Federal-State Joint Board on Universal Service Announces the Creation of a Rural Task Force, Solicits Nominations for Membership on Rural Task Force*, Public Notice, FCC 97J-1 (rel. Sept. 17, 1997).

¹² The existing high-cost support mechanism provides increasing amounts of support based on the percentage by which a carrier's loop costs exceed the national average cost per loop, beginning with loop costs greater than 115 percent of the national average cost per loop. See 47 C.F.R. §§ 36.631(c), (d); *Thirteenth Order on Reconsideration*, FCC 99-119 at para. 98. The existing mechanism provides support only for loop costs, while the new forward-looking mechanism for non-rural carriers provides support based on the estimated cost of all components of the network necessary to provide supported services.

inadequately served.¹³ In the *First Report and Order*, the Commission stated that it would revisit certain issues pertaining to the availability of service in unserved areas¹⁴ and universal service support in insular areas.¹⁵ In its *Second Recommended Decision*, the Joint Board recommended that the special needs of unserved areas be investigated and subjected to a more comprehensive evaluation in a separate proceeding.¹⁶ Telephone penetration rates among low-income consumers, and in insular, high-cost, and tribal lands lag behind the penetration rates in the rest of the country.¹⁷ Indeed, while approximately 94.2 percent of all households in the United States have telephone service today,¹⁸ subscribership levels for very low income households (78.3 percent),¹⁹ insular areas,²⁰ certain high-cost areas,²¹ and tribal lands (46.6 percent),²² are significantly lower than the national average. The Commission has stated that these low penetration rates are largely the result of "income disparity, compounded by the unique challenges these areas face by virtue of their location."²³

6. The Commission has been particularly concerned that Indians²⁴ on reservations, in comparison to other Americans, have less access even to basic telecommunications services. In

¹³ *Thirteenth Order on Reconsideration*, FCC 99-119 at paras. 91-92.

¹⁴ *First Report and Order*, 12 FCC Rcd at 8885-8886.

¹⁵ *First Report and Order*, 12 FCC Rcd at 8897, 9109, and 9137.

¹⁶ *Second Recommended Decision*, 13 FCC Rcd at 24764.

¹⁷ For recent data concerning which American households have access to wireline telephones, computers and the Internet, see *Falling Through the Net: Defining the Digital Divide*, National Telecommunications and Information Administration (NTIA), U.S. Department of Commerce (July 1999) (concluding, among other things, that where a person lives can greatly influence the likelihood of telephone ownership). The full report, additional charts, and links to the original Census data and survey instruments are available on NTIA's website: <http://www.ntia.doc.gov>.

¹⁸ *Telephone Subscribership in the United States*, Report, Table 1 (Com. Car. Bur., rel. Feb 18, 1999).

¹⁹ *Telephone Subscribership in the United States*, Report, Table 4 (households with annual income under \$5,000).

²⁰ Telephone subscribership in Puerto Rico, for example, is 72 percent. *First Report and Order*, 12 FCC Rcd at 8843, n.281.

²¹ Telephone subscribership in the territory served by the Dell Telephone Cooperative in Texas, for example, is only about 82.8 percent. The penetration rate derived from the 1990 census. At that time, the Dell Telephone Cooperative was the company with the highest per-loop costs in the nation.

²² See *Housing of American Indians on Reservations – Equipment and Fuels*, Statistical Brief, Bureau of the Census, SB/95, April 1995 at 2 (based on 1990 Census data).

²³ *First Report and Order*, 12 FCC Rcd at 8839.

²⁴ In this Notice, we refer to "Indians" and "Indian tribes." See The Federally Recognized Indian Tribe List Act of 1994 (Indian Tribe Act), Pub. L. 103-454, 108 Stat. 4791 (1994). The term "Indian" shall include "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. . . . Eskimos and other aboriginal peoples of Alaska shall be considered Indians." 25 U.S.C. § 479. The term "Indian tribe" means "any Indian or Alaska Native tribe, band, nation, pueblo, village or community that the Secretary of the Interior acknowledges to exist as an Indian tribe." 25 U.S.C. § 479a(2). The Secretary of the Interior is required to publish in the Federal Register an annual list of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians. 25 U.S.C. § 479a-1.

1998, the Commission began formally examining its relationship with Indian tribes and the unique issues involved in providing access to telephone service for Indians on reservations. As a first step, Commissioners and staff met with many tribal leaders and other Indian representatives to obtain their input. In meetings on April 30, 1998, and July 7, 1998, Commissioners and staff heard from a variety of tribal leaders, tribal telephone company representatives, academics, government personnel, and others with experience and expertise in the deployment of telecommunications services on reservations.²⁵ Experts discussed problems ranging from geographic isolation to lack of information to economic barriers. These meetings provided an unprecedented opportunity for the Commission to hear about the variety of interrelated obstacles that have resulted in the lowest penetration rates in the country.²⁶ Following these meetings, several of the experts returned in the fall of 1998, to provide a tutorial on Indian law for Commission staff.

7. Based on this informal dialogue with experts, the Commission determined that it would conduct public hearings to explore further the reasons for the lack of telephone service and to determine what specific actions the Commission could take that would improve access to telephone service on Indian reservations. The hearings, entitled "Overcoming Obstacles to Telephone Service for Indians on Reservations," BO Docket No. 99-11, provided an opportunity to obtain formal testimony and comments on the range of problems the Commission had begun to identify. The first field hearing was held on January 29, 1999 at the Indian Pueblo Cultural Center in Albuquerque, New Mexico.²⁷ The second field hearing was held on March 23, 1999 at the Gila River Indian Community in Chandler, Arizona.²⁸ Each hearing consisted of three panels representing tribal authorities and tribal telephone companies, industry, and government and consumer groups.²⁹ The Commission heard extensive testimony on issues including the costs of delivering services to remote areas having very low population densities; the impact of the size and extent of local calling areas on affordability of service; the quality of telephone service on reservations; the complexities of governmental jurisdiction and sovereignty issues; and the effects on telephone service of low incomes and high unemployment on reservations. Transcripts of the hearings and comments filed by interested parties are available on the

²⁵ For a list of participants, see Appendix A.

²⁶ In addition, in July 1998, Commissioner Gloria Tristani and Amy Zoslov, Chief, Auctions Division, Wireless Telecommunications Bureau, spoke at a three day National Native American Telecommunications Workshop in Albuquerque, New Mexico (*NNAT Workshop*). The transcript of the workshop is available via the Internet: <http://aises.uthscsa.edu/~yawakie/Proceedings/Proceedings.html>.

²⁷ Federal Communications Commission Will Hold a Series of Public Hearings on Telephone Service for Indians on Reservations and Seeks Comment from the General Public on All Testimony and Other Evidence Presented Therein; *Public Notice*, BO Docket No. 99-11, DA 99-201 (OCBO rel. Jan. 21, 1999) (*Overcoming Obstacles Proceeding: Albuquerque Hearing*).

²⁸ FCC to Hold Second Public Hearing in Series on Telephone Service for Indians on Reservations; Set for March 23 in Chandler, Arizona, *Public Notice*, BO Docket No. 99-11, DA 99-430 (OCBO rel. Mar. 2, 1999) (*Overcoming Obstacles Proceeding: Arizona Hearing*); Deadline Extended Until June 28, 1999 for Comments on Overcoming Obstacles to Telephone Service for Indians on Reservations, *Public Notice*, BO Docket No. 99-11, DA 99-1010 (OCBO rel. May 27, 1999) (*Overcoming Obstacles Proceeding*).

²⁹ For a list of participants, see Appendix B.

Commission's website.³⁰ Comments filed in BO Docket Number 99-11 will be incorporated, where relevant, into the record of this proceeding.

8. Further, in connection with each of the field hearings, Commissioners and staff made site visits to Indian reservations and tribally-owned telephone companies. These included visits to the Rosebud Reservation, the Santa Domingo, Jemez, and Picuris Pueblos, and to Saddleback Communications, the Gila River Telephone Company, the Salt River Pima-Maricopa Reservation, the Navajo Nation, the Hopi Reservation, and the Havasupai Reservation. These site visits provided an opportunity for Commissioners and staff to observe firsthand the state of telephone service in these reservations and pueblos and to hear directly from tribal members about their experiences. For example, Commissioners and staff visited the home of an elderly couple who could not afford the cost of installing a telephone in their home. The husband of the couple explained that he was suffering from a chronic illness, but was unable to reach the hospital or his doctor by telephone to schedule medical appointments and discuss his treatment. During another site visit, a tribal member stated that a relative had died during a medical emergency when his family was unable to call an ambulance in time when critical medical attention was needed. In addition, the trips to Saddleback Communications and the Gila River Telephone Company enabled Commission staff to view the successful operations of some tribally-owned telephone companies.

9. In this Further Notice of Proposed Rulemaking (Further Notice), the Commission addresses the unique issues that may limit telecommunications deployment and subscribership in the unserved or underserved regions of our Nation, including on tribal lands and in insular areas. In particular, the Commission seeks comment on current levels of deployment and subscribership in unserved, tribal and insular areas, including penetration rates, availability of telecommunications services, and possible impediments to increased deployment and penetration. With respect to tribal areas, the Commission seeks comment on issues that may be affecting the availability of universal service in tribal areas, including the assignment of jurisdiction, designation of eligible telecommunications carriers, and possible modifications to federal high-cost and low-income support mechanisms that may be necessary to promote deployment and subscribership in these areas. In particular, the Commission seeks comment on the possibility of allowing carriers to establish separate tribal study areas, raising the cap on the high-cost fund to allow for growth based on separate tribal study areas, and revisions to its Lifeline rules. In a companion Notice of Proposed Rulemaking we are adopting today, we seek comment on the potential of wireless technology to provide basic telephone service to tribal lands.³¹

10. With respect to unserved areas, the Commission seeks further comment regarding the implementation of section 214(e)(3) of the Act, which permits the Commission or state commissions to order a carrier to provide service to an unserved community, including the possibility of adopting a competitive bidding mechanism to identify the carrier or carriers best able to serve an unserved area. The Commission also seeks comment on possible modifications to the federal low-income and rural health care support mechanisms in underserved areas,

³⁰ http://www.fcc.gov/Panel_Discussions/Teleservice_reservations/. See Appendix C for a list of parties filing comments BO Docket No. 99-11.

³¹ *Extending Wireless Service to Tribal Lands*, Notice of Proposed Rulemaking, WT Docket No. 99-266, FCC 99-205, (adopted Aug. 5, 1999).

including tribal and insular areas, including the possibility of expanding LinkUp to include facilities based charges, and providing support for intrastate toll-calling and rural health care infrastructure. The Commission seeks comment on rule changes designed to enhance the availability of support for rural health care providers in insular areas, including determining the urban rate and the nearest large city. Through these efforts, we seek to ensure that unserved and underserved areas have access to telecommunications services. With respect to tribal lands, we also seek to ensure that our efforts are consistent with principles of tribal sovereignty, the federal trust relationship, and support for tribal self-determination.

II. CURRENT LEVELS OF DEPLOYMENT AND SUBSCRIBERSHIP

11. In this section, we seek to gain a better understanding of the characteristics of unserved and underserved areas, including insular and tribal lands, which by their very nature are difficult to assess. We also seek comment on specific factors preventing deployment of telecommunications services in unserved areas and causing unusually low subscribership rates in underserved areas. We seek to determine which of these factors are common among rural, insular, high-cost, and tribal lands, and which are unique to specific types of areas. We ask commenters to support their comments with empirical evidence, in addition to anecdotal evidence, to the extent possible.

A. Penetration Rates

12. The Industry Analysis Division of the Common Carrier Bureau publishes a Subscribership Report three times per year.³² The data in this report is based on the Current Population Survey (CPS), conducted monthly by the Census Bureau to keep track of the unemployment rate and other socio-economic conditions. The survey, however, is based on information from only 50,000 households nationwide and does not identify geographic areas with fewer than 100,000 people. Because many unserved, tribal and insular areas fall below this population threshold, the CPS cannot be used to estimate penetration rates for these areas. In addition, this data does not include areas of the United States that are not states, including Puerto Rico and the Virgin Islands. The long form of the decennial census, which is delivered to millions of households, contains a question about telephone subscribership. As a result, the census data can be used to estimate telephone penetration for smaller geographic areas. This data, however, is collected only every ten years and it takes the Census Bureau one year to compile results.

13. We seek detailed information, to the extent that it is available, on penetration rates in high-cost areas, insular areas, tribal lands, and any other areas considered to be underserved. By the term penetration rate, we mean the percentage of households within a specified area that have telephone service in the housing unit.³³ We seek this information on a national level, on a state-by-state or territory-by-territory level, and on an area-by-area level. To the extent possible, we encourage commenters to provide the following additional information in each of the areas, and on each of the levels, where they measure penetration rates: (1) total population; (2) population density; (3) average annual income; and (4) average unemployment rate. We also ask that

³² *Telephone Subscribership in the United States*, Report, Table 1 (Com. Car. Bur., rel. Feb 18, 1999).

³³ A housing unit is a place in which a household resides.

commenters briefly explain the methods by which they gather their data (*e.g.*, census data, statistical sampling, etc.). We also seek comment on the difficulty of getting such information, such as the difficulty of mapping a telephone service territory onto the census territories (such as census block groups) because the boundaries may not always coincide, and questions concerning the definitions of the terms “household” and “telephone service.”

B. Availability and Cost of Telecommunications Services

14. In each of the areas, and on each of the levels described above in section II.A above, we seek to determine the nature of the telecommunications services available and the costs of such services. In particular, we seek comment on the extent to which these areas receive the following service, if any: basic telephone service, services included within the definition of universal service,³⁴ and/or advanced telecommunications services.³⁵ We also seek comment on whether any carrier is providing the following services and the approximate number of households served by each service: wireline, wireless, Basic Exchange Telecommunications Radio Systems (BETRS),³⁶ or other telecommunications services; cable television; direct broadcast satellite service; other satellite services that provide voice and data, such as those provided through VSAT networks; Internet service; and electric service. In addition, we seek comment on the monthly rate for each of these services. With specific regard to basic telephone service, we seek comment on the average monthly bill for local service, local toll service, and long-distance service.

15. To the extent that underserved, high-cost, insular, and/or tribal lands have basic telephone service, we seek comment on whether the local calling area includes the nearest metropolitan area or other area where the nearest medical, government, cultural or entertainment facilities exist, *i.e.*, the “community of interest.” For unserved areas, and in particular tribal lands, we also seek comment to determine whether these areas fall within the designated service area of existing carriers, regardless of whether such carriers are providing service to the area.

16. We seek comment on the extent to which existing facilities currently used to provide other services (*e.g.*, radio broadcast towers, cable television plant, electrical poles and satellite infrastructure) could be adapted to provide the services included within the definition of

³⁴ The following services or functionalities are supported by federal universal service support mechanisms: single-party service; voice grade access to the public switched network; DTMF signaling or its functional equivalent; access to emergency services; access to operator services; access to interexchange service; access to directory assistance; and toll limitation services for qualifying low-income consumers. 47 C.F.R. § 54.101(a). *See First Report and Order*, 12 FCC Rcd at 8809.

³⁵ Section 706(b) of the Act defines “advanced telecommunications capability” as “high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.” 47 U.S.C. §706(b). The Commission defined “broadband” as having the capability of supporting a bandwidth in excess of 200 kbps in the last mile, both from the provider to the consumer and from the consumer to the provider. *See An Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1998*, Report on Advanced Telecommunications Capability, CC Docket No. 98-146, FCC 99-5 (rel. Feb. 2, 1999) at para. 20.

³⁶ BETRS is a two-way channel wireless service used to provide basic exchange service to remote rural areas of the country. *Basic Exchange Telecommunications Radio Service*, Report and Order, CC Docket No. 86-495, 3 FCC Rcd 214 (1988). *See* 47 C.F.R. §§ 22.99, 22.725, 22.727.

universal service.³⁷ We also seek comment on whether specific services included within the definition of universal service could not be provided via these facilities. We seek comment on the extent to which facilities used to provide telecommunications service to customers outside the unserved or underserved areas exist adjacent to or nearby the unserved or underserved areas. In particular, we seek comment on whether railroad tracks, or towers used for the placement of antennas, are found in these adjacent areas. We seek comment on what role the Commission might play in encouraging the use of these other facilities to provide service in underserved areas. For example, we seek comment on whether the Commission, or some other entity, should develop a database to maintain information about facilities that could be used to provide service in currently unserved or underserved areas, including tribal lands and insular areas.

17. We also seek comment on the possible shared use of existing federal telecommunications infrastructure, facilities or other resources, including government rights-of-way, to provide service in unserved or underserved areas, including tribal and insular areas. We seek comment on whether federal telecommunications resources could be made available in the short term to serve as connecting backbone infrastructure for health and safety telecommunications in unserved areas. We encourage federal entities with government owned telecommunications resources, particularly the Bureau of Indian Affairs, to comment on this issue.

18. Individuals from Indian communities, state agencies and the telecommunications industry have commented that satellite and terrestrial wireless systems may represent practical and cost-effective alternatives for providing service in unserved areas, including tribal lands.³⁸ In the pending 2 GHz proceeding, which proposes policies and rules for licensing and operation of the 2 GHz mobile satellite service (MSS) systems in the United States,³⁹ the Commission sought comment on incentives and policies to encourage provision of satellite services to unserved, rural, insular or economically isolated areas.⁴⁰ The commenters generally support the Commission's tentative conclusion that satellites represent an excellent technology for providing basic and advanced telecommunications services to unserved areas, including tribal lands.⁴¹ Several commenters stated that the Commission should take positive steps to encourage access to Universal Service Funds by satellite operators or service providers. Several commenters also requested that the Commission should identify express and implicit regulatory provisions that

³⁷ See n. 34, *supra*.

³⁸ See e. g., *Overcoming Obstacles Proceeding: Albuquerque Hearing*, Testimony of Gene DeJordy, Executive Director, Western Wireless, p. 94 (currently serves 23 Indian reservations); *Overcoming Obstacles Proceeding: Arizona Hearing*, Testimony of Carl Artman, Airadigm Communications, Inc., p. 100 (Oneida tribe invested in its own wireless communications because of its lower cost of deployment and maintenance when compared to wireline); *Overcoming Obstacles Proceeding: Albuquerque Hearing*, Testimony of Francis Mike, Navajo Communications Company, p. 84-89 (discussing the use of satellite services as a solution to meet Indian telecommunications needs)

³⁹ In the Matter of The Establishment of Policies and Service Rules for The Mobile Satellite Service in The 2 GHz Band, IB Docket No. 99-81, RM-9328, Notice of Proposed Rulemaking, FCC 99-50, para. 95 (rel. March 25, 1999) (*2 GHz Proceeding*).

⁴⁰ *Id.* at para. 95.

⁴¹ See *2 GHz Proceeding*: Comments of Boeing at 16-18, Celsat at 28-29, Constellation at 27-28, Globalstar at 44-46, ICO at 19-21, ICO USA Service Group (BT NA, Hughes, Telmex, and TRW) at 44-46, Iridium at 41-43, MCHI at 26, and SIA at 2-3.

may prevent satellite providers from seeking universal support subsidies and reform those provisions, or forbear from imposing these provision, so that MSS providers can fully participate in the Universal Service Support initiative.⁴²

19. Satellite networks, used either on a stand alone basis or in combination with a terrestrial wireless network, may offer a cost advantage over wireline or other alternatives in remote areas where a limited population may not provide the economies of scale to support the deployment of wireline or other networks for each community.⁴³ Because satellites have large coverage areas, and in many cases, can reach an entire nation, satellite providers may achieve greater economies of scale in serving isolated areas since the costs of deployment could be spread across a number of communities.⁴⁴ The basic build-out required to obtain satellite service is for earth stations to transmit and receive satellite signals.⁴⁵ We seek comment on why satellite or terrestrial wireless systems have not been used more extensively to serve these areas.⁴⁶ Specifically, we seek comments regarding the particular characteristics of satellite or terrestrial wireless systems that render these technologies suited for serving unserved areas, the costs associated with deployment, the availability of federal universal service support, and any other impediments to deployment. To the extent that costs deter satellite and terrestrial wireless deployment, we seek comment on what actions the Commission should take to support the establishment and maintenance of satellite and terrestrial wireless services.⁴⁷ We ask parties to comment on whether specific aspect of our universal service rules may deter both current and

⁴² See *2 GHz Proceeding*: Comments of Globalstar at 44-46 and MCHI at 26; reply comments of ICO USA Service Group 44-46.

⁴³ See, e.g., *Overcoming Obstacles Proceeding*: Comments of Skybridge L.L.C., at p. 4 (“[t]he geographic and economic considerations that make service to reservations unattractive to terrestrial networks...are not an issue for providers of satellite telecommunications. . . .”)

⁴⁴ See, e.g., *Overcoming Obstacles Proceeding*: Comments of ICO Global Communications (Holding) Limited, at p. 3 (suggesting that with satellite service, incremental costs of adding additional subscribers in high-cost areas is low).

⁴⁵ We note that American Mobile Satellite Corporation, a GSO MSS licensee, is providing service to a police force in the Navajo Nation and to the remote community of Tortilla Flat, Arizona, and that General Communications, Inc., an earth station operator, provides voice and private line services to fifty rural Alaskan Bush communities.

⁴⁶ See, e.g., *Overcoming Obstacles Proceeding: Albuquerque Hearing*, Testimony of George Arthur, Council Delegate, Navajo Nation, p. 43 (satellite services are too expensive for use in resolving Indian telecommunication needs). We note that in a companion Notice of Proposed Rulemaking adopted today, we are seeking comment on: (1) whether certain changes to Commission rules would provide greater incentives for existing wireless and satellite licensees to extend service to tribal lands and other unserved areas; and (2) ways the Commission might encourage deployment of wireless and satellite-based telecommunications service to tribal lands and other unserved areas through the Commission's development and licensing of new wireless and satellite services. See *Extending Wireless Service to Tribal Lands*, Notice of Proposed Rulemaking, WT Docket No. 99-266, FCC 99-205, (adopted Aug. 5, 1999).

⁴⁷ Several commenters to the *Overcoming Obstacles Proceeding* expressed concern over lack of access to universal service funds. See, e.g., Comments of the Cellular Telecommunications Industry Association (June 28, 1999) at p. 1 (“For wireless carriers, the most significant obstacle to offering basic telecommunications service is the Commission's present implementation of Universal Service support mechanisms”); *Overcoming Obstacles Proceeding: Arizona Hearing*, Testimony of Richard Watkins, Smith Bagley, Inc., p. 111 (“[U]niversal service support [must be] made available to wireless carriers”). See also, *Overcoming Obstacles Proceeding: Arizona Hearing*, Testimony of Jim Irvin, Commissioner Chairman, Arizona Corporation Commission, p. 143-151.

future satellite services providers from providing service to rural, insular, and other unserved communities, and what specific steps the Commission can undertake to encourage the use of universal service support by satellite service providers. We also seek comment on any other actions the Commission should take to encourage the deployment of the most cost-effective, practical solution in these geographically extreme areas.

C. Impediments to Increased Penetration

20. An important step in increasing low penetration in unserved or underserved high-cost, insular, and tribal lands is understanding the impediments to higher penetration rates. Accordingly, in this section, we seek comment on the nature of such impediments. To facilitate discussion, we have divided this issue into the categories described below. These categories are not intended to be exhaustive, however, and we encourage commenters to discuss any additional impediments to increased penetration that they are able to identify.

21. In addition to identifying impediments to increased penetration rates, we also ask commenters to discuss potential solutions for overcoming those impediments. We do not reach tentative conclusions on any of the proposals discussed below. Instead, we seek comment on the need for the Commission to address the specific concerns set forth below and the costs and benefits of the proposals discussed. We seek comment on how the Commission should measure its success in satisfying the mandate in the 1996 Act that consumers in all regions of the nation have access to telecommunications services.⁴⁸ We seek comment on what measure we could use, other than penetration rates, to evaluate our success in achieving this goal.

1. Demographic Factors

22. In section II.A above, we ask commenters to supply data for high-cost, insular, and tribal lands regarding: (1) total population; (2) population density; (3) average annual income; and (4) average unemployment rate. Bureau of Census data indicates that income and education levels greatly affect telephone penetration rates and that geographic location can also make a difference.⁴⁹ In this section, we seek specific comments on how these demographic factors affect penetration rates. For example, do income levels have a greater effect on penetration rates than population density? Do the combined effects of low income and low population density have an exponential effect on penetration rates? We seek comment on whether other demographic factors significantly affect penetration rates in high-cost, insular, and tribal lands, *e.g.*, education levels.

2. Geographic Factors

23. One of the more obvious explanations for low penetration rates in high-cost, insular, and tribal lands is that these areas are unusually expensive to serve. Distance appears to be one reason line extension charges are so high. During the New Mexico and Arizona Field Hearings, several tribes testified about the remoteness of their locations and the challenges that remote

⁴⁸ See 47 U.S.C. § 254(b)(3).

⁴⁹ Falling Through the Net II: New Data on the Digital Divide, National Telecommunications and Information, U.S. Department of Commerce (July 1998) at 2-3. This report may be found at <http://www.ntia.doc.gov/ntiahome/net2/falling.html>.

locations presented in terms of telecommunications services.⁵⁰ For example, in 1997, the Navajo Communications Company issued 72 line extension charge estimates that averaged more than \$40,000, including eight over \$100,000 and one over \$157,000.⁵¹ The cost for installation of a line on the Salt River Pima-Maricopa Indian Community (located in the heart of metropolitan Phoenix) is \$5,000.⁵² We seek comment on the general terrain, including the existence of mountains, plains, swamps, water, plateaus, canyons, etc., that create challenges in providing telecommunications services. We also seek comment on the extent to which the absence of necessary infrastructure, for example roads or electrical capacity, constitutes a barrier to deployment in rural, insular, high-cost, and tribal lands⁵³.

3. Financial Factors

24. We seek comment on whether difficulties in obtaining access to financing limits the ability of carriers to provide service in unserved or underserved rural, insular, high-cost, and tribal lands. We seek comment on any specific provisions in loan agreements that serve to deter deployment in these areas. We also seek comment on any measures the Commission could take that would diminish the risks faced by investors and would enhance the ability of carriers to attract financing necessary to provide service in unserved or underserved rural, insular, high-cost, and tribal lands. We also seek comment on the availability and utility of existing programs that may provide funding and assistance to carriers seeking to provide telecommunications service in unserved areas and underserved areas, including tribal and insular areas,⁵⁴ including whether the availability of existing sources of funding and assistance is adequately publicized.⁵⁵

⁵⁰ See *Overcoming Obstacles Proceeding: Albuquerque Hearing*, Testimony of Arnold Cassador, President Jicarilla Apache Tribe, p. 49 (because of remote location many people are without access to telephone service); Testimony of Anthony Lucio, Councilman, Zuni Pueblo, p. 62 (Zuni is the farthest of the 19 pueblos); Testimony of George Arthur, Council Delegate, Navajo Nation, at p. 1 (implementing a telecommunications network on a remote and expansive reservation presents challenges).

⁵¹ See Navajo Communications Company, response to Arizona Corporation Commission Data Request, ACC Docket No. T-2115-97-640 (Unserved Areas), Jun. 19, 1998 at attachment B (placed on the record of CC Docket No. 96-45); *Overcoming Obstacles Proceeding: Arizona Hearing*, Testimony of James Irvin, Commissioner Chairman, Arizona Corporation Commission, p. 147.

⁵² *Overcoming Obstacles Proceeding*, Testimony of Ivan Makil, President, Salt River Pima-Maricopa Indian Community, p. 1. For a discussion of Rural Utility Services programs, see *Overcoming Obstacles Proceeding: Arizona Hearing*, Testimony of Christopher McLean, Deputy Administrator, Rural Utility Service, p. 18-26; see also Testimony of Madonna Peltier Yawakie, Minnesota American Indian Science and Engineering Society, p. 154-157.

⁵³ See *Assessment of Technology Infrastructure in Native Communities, Final Report, July 1999*, College of Engineering, New Mexico State University, Research sponsored by the Economic Development Administration, U.S. Department of Commerce, at p. 20 (*Assessment of Infrastructure*) (placed on the record of CC Docket No. 96-45).

⁵⁴ See Native Networking: Telecommunications and Information Technology and Indian Country; Benton Foundation (April 1999) at pages 20-39. This Report is available on the Internet at <http://www.benton.org/Library/Native/>.

⁵⁵ See *Overcoming Obstacles Proceeding: Albuquerque Hearing*, Testimony of Anthony Lucio, Councilman, Zuni Pueblo, p. 63.

4. Cultural Factors

25. We seek comment on the extent to which cultural values or lifestyle preferences deter consumer interest in subscribing to telecommunications services in unserved or underserved areas.⁵⁶ For example, we seek comment on whether concerns about cultural preservation, religion, identity, and values may affect the willingness of tribal authorities to allow or promote the availability of telecommunications services in their communities.⁵⁷ Similarly, we seek comment on whether there are a significant number of individuals that simply do not want telecommunications services because of personal lifestyle choices. We also seek comment on the extent to which carriers justify the lack of deployment in unserved or underserved rural, insular, high-cost, and tribal lands based on concerns for cultural preservation and whether these concerns are legitimate. In addition, we seek comment on whether the Commission's efforts to promote deployment and subscribership in unserved and underserved areas should be constrained by the cultural choices expressed by tribal authorities or other local leadership.

5. Regulatory Factors

26. In this section, we seek comment on impediments imposed by various laws, regulations or practices that may deter carriers from providing service to unserved or underserved areas, including federal, state, tribal or insular authorities.

27. *Federal Regulatory Impediments.* We seek comment on the current process for obtaining access to rights-of-way on tribal lands and to what extent this process deters carriers from providing service on tribal lands.⁵⁸ Under the Right-of-Way Act of 1948, there are three critical components for obtaining rights-of-way over tribal land: (1) the Secretary of the Interior through the Bureau of Indian Affairs must grant the easement for the right-of-way;⁵⁹ (2) compensation of not less than fair market value, as determined by the Secretary, plus severance damages must be paid to the property owner;⁶⁰ and (3) tribal consent must be obtained.⁶¹ The first of these requires a service provider to undergo environmental assessments and secure cultural and archaeological clearances from the Bureau of Indian Affairs.⁶² The second

⁵⁶ See *Overcoming Obstacles Proceeding: Albuquerque Hearing*, Testimony of Stanley Pino, All Indians Pueblo Council; Office of Technology Assessment, United States Congress, *Telecommunication Technology and Native Americans: Opportunities and Challenges*, OTA-ITC-621 (Washington, DC: U.S. Government Printing Office, August, 1995).

⁵⁷ See, e.g., *Overcoming Obstacles Proceeding: Albuquerque Hearing*, Testimony of Eagle Rael, Governor, Picuris Pueblo, p. 58 (describing reluctance to bury telephone cables near ceremonial sites). Madonna Peltier Yawakie specifically refutes the position that Indians, because of cultural concerns, fail to use telephones or are communal in their use of telephones. See *Overcoming Obstacles Proceeding*, Testimony of Madonna Peltier Yawakie, at p. 1.

⁵⁸ See, e.g., *Overcoming Obstacles Proceeding*, Testimony of George Arthur, Navajo Nation; Parker Sando, "Right of Way and Easement Practices," presented at AISES National Native American Telecommunications Workshop, July 28-30, 1998, Albuquerque, New Mexico, workshop transcript at 5-4 (*NNAT Workshop Transcript*).

⁵⁹ 25 U.S.C. § 323 (1998).

⁶⁰ 25 U.S.C. § 325 (1998).

⁶¹ 25 U.S.C. § 324 (1998).

⁶² Raymond Etcitty, "Right of Way and Easement Practices," *NNAT Workshop Transcript*, p. 5-1.

component requires the service provider to obtain the standard appraisal it would for any easement but under standards set by Bureau of Indian Affairs.⁶³ Finally, the service provider must also meet any conditions imposed by the particular tribe because the tribe has the ultimate authority to accept or reject the right-of-way. Carriers have indicated that this process is a significant barrier to entry.⁶⁴ Tribal authorities have expressed concern about the ability of carriers to use existing rights-of-way to establish new terrestrial networks without obtaining the consent of the tribal authority.⁶⁵ In addition, carriers and tribal authorities appear to have concerns concerning appropriate compensation for use of rights-of-way in tribal lands.⁶⁶ To the extent rights-of-way management issues pose a barrier to entry on tribal lands,⁶⁷ we seek comment on what role, if any, the Commission could play in addressing these issues.⁶⁸

28. We also seek comment on whether any aspect of our universal service rules deters carriers from providing service to unserved and underserved areas. For example, does the definition of supported services deter terrestrial wireless or satellite service providers from providing services in these areas? In our ongoing proceeding to reform the high-cost universal service support mechanism for non-rural carriers, several parties representing rural carriers have filed comments asking that we adjust or eliminate the cap on the high-cost loop fund to coincide with the anticipated transition of non-rural carriers to a new forward-looking support mechanism on January 1, 2000.⁶⁹ We observe that the cap on the existing high-cost fund properly allows for

⁶³ Steve Campbell, "Right of Way and Easement Practices," *NNAT Workshop Transcript*, p. 5-4.

⁶⁴ See, e.g., *Overcoming Obstacles Proceeding: Albuquerque Hearing*, Testimony of Francis Mike, Navajo Communications, p. 87 ("very long, difficult, and expensive Bureau of Indian Affairs and Navajo Nation right-of-way processes"); Testimony of Arthur Martinez, Western New Mexico Telephone Company, p. 92 ("permit process is tedious and in many cases can take up to a year to complete"); Testimony of Gene DeJordy, Western Wireless, p. 96; Testimony of Aloa Stevens, Citizens Communications, p. 94; Testimony of Richard Watkins, Smith Bagley, p. 115; see also *Overcoming Obstacles Proceeding: Comments of US West Communications, Inc.* at p. 5.

⁶⁵ See, e.g., *Overcoming Obstacles Proceeding: Albuquerque Hearing*, Testimony of George Arthur, Navajo Nation, p. 43.

⁶⁶ See *Overcoming Obstacles Proceeding: Albuquerque Hearing*, Testimony of Francis Mike, Navajo Communications, p. 87 ("exorbitant fees for right-of-way acquisition"); Testimony of George Arthur, Navajo Nation, p. 43 ("[the carrier] ... utilized the New Mexico transportation highway right of ways ... [to] avoid having to deal with the Navajo Nation."); Testimony of Gene DeJordy, Western Wireless, p. 96 ("An additional problem ... is the placement and operation of antenna towers."); Testimony of Linda Lovejoy, New Mexico Public Regulations Commission, p. 115 ("[T]here are many obstacles ... [o]ne of these is ... right-of-way from the tribal authorities and federal agencies.") See also *Overcoming Obstacles Proceeding: Comments of US West Communications, Inc.*, at p. 5 ("tribes resisted requests ... and quoted exorbitant fees for [rights-of-way].")

⁶⁷ See generally, *Overcoming Obstacles Proceeding: Response to Questionnaire* filed by Governor Mary Thomas, Gila River Indian Community, pp. 4, 6.

⁶⁸ See, e.g., *Promotion of Competitive Networks in Local Telecommunications Markets*, Notice of Proposed Rulemaking and Notice of Inquiry, WT Docket No. 99-217, FCC 99-141 (rel. July 7, 1999).

⁶⁹ In our ongoing proceeding to reform the high-cost universal service support mechanism for non-rural carriers, several parties representing rural carriers have filed comments asking that we adjust or eliminate the cap on the high-cost loop fund to coincide with the anticipated transition of non-rural carriers to a new forward-looking support mechanism on January 1, 2000. See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Access Charge Reform*, CC Docket No. 96-262, Seventh Report & Order and Thirteenth Order on Reconsideration in CC Docket No. 96-45, Fourth Report and Order in CC Docket No. 96-262, and Further Notice of Proposed Rulemaking, FCC 99-119 (rel. May 28, 1999); Rural Telephone Coalition comments at 16-21 (filed July 23, 1999); Western Alliance comments at 4-7 (filed July 23, 1999).

growth based on the rate of growth in the total number of working loops nationwide. We also observe that carriers do invest in facilities in an amount greater than that which is supported through federal universal service support mechanisms.⁷⁰ We seek comment regarding the extent to which the interim cap on the high-cost fund is a factor contributing to the lack of deployment in unserved areas, including tribal and insular areas.

29. We comment on whether existing LATA⁷¹ boundaries prevent calls from unserved or underserved areas, including tribal lands, to the nearest metropolitan area or community of interest from being included in local service. We seek comment on any other federal rules or Commission regulations which may deter carriers from providing service to unserved or underserved areas. We also observe that issues specific to wireless providers will be addressed in a separate proceeding.⁷²

30. *State Regulations.* We also seek comment on regulations or actions at the state level that may impact deployment and subscribership in unserved and underserved areas.⁷³ We seek comment on the extent to which statewide rate-averaging requirements or limited local calling areas may make the costs of telecommunications service unaffordable to low-income consumers living in unserved or underserved areas. We also seek comment on existing state programs designed to ensure that rates in remote and tribal lands are affordable.

31. *Tribal / Insular Regulatory Impediments.* We seek comment on any regulations or requirements imposed by tribal or insular authorities that may deter entry in tribal lands or in insular areas. For example, we seek comment on whether local governments own or operate the local exchange carrier in their areas and what impact this may have on competitive entry from other cost-effective wireline, terrestrial wireless, or satellite service providers. We seek comment on whether government ownership or operation affects the provision of services supported by universal service mechanisms in these areas. We seek comment on any ownership or employment requirements imposed by tribal authorities that may impair the ability of carriers to provide service and/or compete with tribally-owned carriers. For example, we seek comment on the extent to which tribes require an ownership interest in a carrier as a prerequisite to allowing the carrier to provide service on tribal lands. We seek comment on the impact such requirements may have on the deployment of telecommunications facilities and services on tribal lands.

III. TRIBAL LANDS

32. For our universal service support mechanisms to be effective on tribal lands, we seek to promote active involvement and collaboration between the Commission and tribal authorities.

⁷⁰ See, e.g., Letter from John Ricker, National Exchange Carrier Association (NECA), to Magalie Roman Salas (dated October 1, 1998) ("NECA estimates that the cap will be \$864.2 million for 1999 payments. The individual study area expense adjustments for 1999 total \$926.9 million based on year-end 1997 data, hence payments of expense adjustments will be limited [\$62.7 million] as a result of the indexed cap.")

⁷¹ 47 U.S.C. § 3(25) (defining "Local Access and Transport Area.")

⁷² *Extending Wireless Service to Tribal Lands*, Notice of Proposed Rulemaking, WT Docket No. 99-266, FCC 99-205, (adopted Aug. 5, 1999).

⁷³ See, e.g., Testimony of Aloa Stevens, *Overcoming Obstacles Proceeding: Arizona Hearing*, at 1 ("In some states the regulatory agencies even oppose construction to remote areas, when such line extensions will have the effect of eroding the earnings level, or will eventually raise the cost of service to all other customers.")

As a general matter, we seek comment on how we can increase Indian participation in the Commission's decision-making process.⁷⁴ At a more specific level, we seek comment throughout this section on issues unique to tribal lands that may affect the goals and incentives of federal universal service support mechanisms and consider additional, targeted assistance the Commission may want to provide to promote deployment and subscribership on tribal lands. As described below, the trust relationship between the federal government and Indians as well as principles of tribal sovereignty suggest that the federal government may have the authority to implement particularized measures to address the factors causing the unusually low subscribership on tribal lands. We emphasize that these proposals are not meant to imply that the states have not, or will not, do their share in promoting the availability of universal service on tribal lands. In fact, many states have made significant efforts in this area. We commend them for doing so and we encourage them to continue. In this proceeding, however, we consider measures the Commission may take to fulfill its obligation to address telecommunications needs on tribal lands.

A. Jurisdiction

1. Background

33. As noted above, one of our goals in this proceeding is to identify and address the unique issues that may limit telecommunications deployment and subscribership in unserved or underserved regions of our Nation, including insular areas and tribal lands and to consider what changes in our universal service rules would best address these issues. Our jurisdiction to make these changes springs from our obligation under section 254 of the Act to develop policies and rules for the preservation and advancement of universal service. With respect to tribal lands, our exercise of this section 254 authority must be informed by our exploration of the jurisdiction of states and Indian tribes to regulate and provide telecommunications. Our jurisdiction to alter our universal service rules in ways targeted to benefit unserved tribal lands must also be informed by the principles of Indian law that stem from the unique relationship of the federal government with Indian tribes.⁷⁵

34. This relationship is set forth in the Constitution of the United States, treaties, statutes, Executive Orders and court decisions. Historically, the United States has recognized the special trust relationship between the federal government and tribal authorities, the unique sovereign status of Indian tribes, and the federal obligation to guarantee the right of Indian tribes to self-government.

35. *Trust Relationship.* Federal courts have long recognized a "distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people."⁷⁶ The formation of a trust relationship evolved out of a recognition of the

⁷⁴ See, e.g., *Federal-State Joint Board on Universal Service Announces Rural Task Force*, Public Notice, CC Docket No. 96-45, FCC 98J-1 (Jt. Bd. rel. Jul. 1, 1998) (appointing Elstun Lausen II, Tanana Chiefs Conference, Inc. in category for "other appropriate representatives, including those of groups with special interest concerns, such as individuals or groups representing the concerns of Native Americans.")

⁷⁵ See note 24, above, for definitions of Indians and Indian tribes.

⁷⁶ *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942) (citing *Cherokee Nation v. State of Georgia*, 30 U.S. 1 (1831); *United States v. Kagama*, 118 U.S. 375 (1886); *Choctaw Nation v. United States*, 119 U.S. 1 (1886);

unequal bargaining power of Indian tribes in the formation of the treaties governing their rights and obligations. Over 150 years ago, Chief Justice Marshall acknowledged the special status of Indian tribes in the seminal case of *Cherokee Nation v. State of Georgia*, describing them as “domestic dependent nations.”⁷⁷ Since that time, the courts have routinely observed the federal government’s unique relationship with Indian tribes,⁷⁸ and as recently as June 14, 1999, the Supreme Court again recognized the “special federal interest in protecting the welfare of Native Americans.”⁷⁹ The Supreme Court has stated that, through this special trust relationship, the federal government “has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.”⁸⁰

36. *Tribal Sovereignty*. The Constitution of the United States recognizes the sovereign status of Indian tribes by classing Indian treaties as among the “Supreme Law of the land” and establishes Indian affairs as a unique area of federal concern. Indian tribes retain important sovereign powers over “their members and their territory” subject to the plenary power vested in Congress by the Constitution of the United States. Under the tribal sovereignty doctrine, “Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory.”⁸¹ Under this doctrine, tribes have retained “a semi-independent position . . . not

United States v. Pelican, 232 U.S. 442 (1914); *United States v. Creek Nation*, 295 U.S. 103 (1935); *Tulee v. State of Washington*, 315 U.S. 681 (1942). See also *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1462 (10th Cir. 1997) (federal government has a unique trust relationship with Indians.)

⁷⁷ *Cherokee Nation v. State of Georgia*, 30 U.S. 1 at 17 (1831).

⁷⁸ See e.g., *Nance v. EPA*, 645 F.2d 701, 710 (9th Cir.) (cert. denied sub nom, *Crow Tribe of Indians Montana v. EPA*, 454 U.S. 1081 (1981)); *Inter-Tribal Council of Arizona, Inc. v. Babbitt*, 51 F.3d 199, 203 (9th Cir. 1995).

⁷⁹ *Greater New Orleans Broadcasting Association v. United States*, __ U.S. __, 1999 WL 380810, 380812 (June 14, 1999).

⁸⁰ *Seminole Nation*, 316 U.S. at 297. Since 1970, Presidential policy has reaffirmed the unique sovereign status of Indian tribes, the tribal-federal trust relationship, and the federal obligation to promote tribal self-sufficiency. See, e.g., President Richard Nixon, *Statement to the Congress of the United States*, The White House, July 9, 1970; President Ronald Reagan, *Statement by the President on Indian Policy*, The White House, Jan. 24, 1983; President George Bush, *Indian Policy Statement*, The White House, June 14, 1991; President William Clinton, *Government-to-Government Relations with Native American Tribal Governments*, Memorandum of Apr. 29, 1994, Federal Register vol. 59, No. 85, May 4, 1994, pp. 22951-22952 (*President Clinton’s April 1994 Memorandum*); President William Clinton, *Executive Order on Indian Tribal Governments*, The White House, May 14, 1998 (*President Clinton’s May 1998 Executive Order*). *President Clinton’s April 1994 Memorandum* requires executive agencies to deal with Indian tribes on a government to government basis, carefully consider the implications of proposed actions on tribes and provide tribes with the opportunity to participate in agency activities. Several federal agencies have issued policy statements that recognize the status of tribal governments and support tribal self-determination. See, e.g., U.S. Department of the Interior, Memorandum from Ada E. Deer, Assistant Secretary for Indian Affairs to the Assistant Secretary for Fish and Wildlife and Parks, *Indian Fish and Wildlife Policy*, June 23, 1994; U.S. Department of Energy, *American Indian Policy*, July/August 1994; U.S. Department of Agriculture, Departmental Regulation No. 1020-6, *Policies on American Indians and Alaska Natives*, Oct. 22, 1992; U.S. Department of Commerce, *American Indians and Alaska Native Policy of the U.S. Department of Commerce*, Mar. 30, 1995; U.S. Department of Justice, Office of the Attorney General, *Department of Justice Policy on Indian Sovereignty and Government-to-Government Relations with Indian Tribes*, June 1, 1995; U.S. Environmental Protection Agency, Memorandum from Carol M. Browner, Administrator, to All Employees, *EPA Indian Policy*, Mar. 14, 1994.

⁸¹ *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 140 (1980), quoting *United States v. Mazurie*, 419 U.S. 544, 557 (1975).

as States, not as nations, . . . but as a separate people with the power of regulating their internal and social relations"⁸² The foundation of Indian sovereignty over the reservation and tribal members was first recognized by Chief Justice John Marshall, who described the Indian tribes as "distinct political communities, having territorial boundaries within which their authority is exclusive, and having a right to all lands within those boundaries, which is not only acknowledged but guaranteed by the United States."⁸³ The tradition of tribal sovereignty has persisted since Chief Justice Marshall's early decisions construing the status of Indian tribes. As the Supreme Court has acknowledged "traditional notions of Indian self-government are so deeply ingrained in our jurisprudence that they have provided an important 'backdrop' against which vague or ambiguous federal enactment must always be measured."⁸⁴ Congress recently declared that the trust relationship "includes the protection of the sovereignty of each tribal government."⁸⁵

37. *Tribal Self-determination.* Through the enactment of various statutes, Congress has demonstrated an "overriding goal of encouraging tribal self-sufficiency and economic development."⁸⁶ For example, the Indian Financing Act of 1974 provides in pertinent part that: "[i]t is hereby declared to be the policy of Congress . . . to help develop and utilize Indian resources, both physical and human, to a point where the Indians will fully exercise responsibility for the utilization and management of their own resources and where they will enjoy a standard of living from their own productive efforts comparable to that enjoyed by non-Indians in neighboring communities."⁸⁷

2. Issues for Comment

38. We recognize that principles of Indian law, including the trust relationship between the federal government and Indian tribes, tribal sovereignty, and tribal self-determination, must apply with equal force in the area of telecommunications.⁸⁸ With respect to telecommunications services provided by tribal carriers on or off the reservation or by non-tribal carriers within tribal

⁸² *McClanahan v. Arizona State Tax Comm'n*, 441 U.S. 164, 173 (1973), quoting *United States v. Kagama*, 118 U.S. 375, 381-382 (1886).

⁸³ *Worcester v. Georgia*, 6 Pet. 515, 557 (1832).

⁸⁴ *White Mountain Apache Tribe v. Bracker*, 448 U.S. at 143 (internal cites omitted). See also, *McClanahan v. Arizona State Tax Comm'n*, 441 U.S. 172 (1973) ("It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government.") Tribal sovereignty, however, remains subordinate to Congress' plenary power. See *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 154 (1980) (recognizing that "tribal sovereignty is dependent on, and subordinate to, only the Federal Government").

⁸⁵ 25 U.S.C. § 3601.

⁸⁶ *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334-35 (1983) (internal quotations omitted) (referencing the Indian Financing Act of 1974, 25 U.S.C. § 1451, *et seq.*; the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450, *et seq.*; the Indian Reorganization Act of 1934, 25 U.S.C. § 461, *et seq.*; the Indian Civil Rights Act of 1968, 25 U.S.C. § 1301, *et seq.*).

⁸⁷ 25 U.S.C. § 1451. See *Mescalero*, 42 U.S. at 334 (citing 25 U.S.C. § 1451). See also *The Indian Self-Determination and Education Assistance Act of 1975*, 25 U.S.C. § 450; *The Indian Reorganization Act of 1934*, 25 U.S.C. § 461; *The Indian Civil Rights Act of 1968*, 25 U.S.C. § 1301; *The Indian Gaming Regulatory Act of 1988*, 25 U.S.C. § 2701 *et seq.*; and *The Indian Tribal Justice Act of 1993*, 25 U.S.C. § 3601 *et seq.*

⁸⁸ *Thirteenth Order on Reconsideration*, FCC 99-119 at para. 92, n.252.

lands (all of which are referred to jointly as “tribal telecommunications”) the parameters of federal, state and tribal authority, however, are not always clear. The Supreme Court, itself, has acknowledged that “generalizations on this subject have become treacherous.”⁸⁹ Nonetheless, some of the proposals presented in this Further Notice necessitate an effort to evaluate these jurisdictional relationships. In this Further Notice, we seek comment to determine how best to give effect to principles of Indian law in the context of rule changes intended to benefit unserved and underserved tribal lands.

39. *State Jurisdiction.* Three of the proposals detailed later in this Further Notice deal with provisions of sections 254 and 214 of the Act, and of our existing rules that are triggered when the state lacks jurisdiction over a carrier providing telephone exchange or access service in a particular area. First, as described in section IV, the determination of whether a state has jurisdiction over a common carrier providing telephone exchange service and exchange access is key in determining whether the Commission is required to designate telecommunications carriers as eligible to receive federal universal service support in high-cost areas. Second, as detailed in section V, in unserved areas where the state lacks jurisdiction the Commission, pursuant to section 214(e)(3) shall determine which common carrier or carriers are best able to provide service. Third, in section III.D.1, we propose that revisions to our Lifeline rules to address the situation faced by carriers not subject to state jurisdiction.

40. The issue of the extent to which tribal authorities or state governments have authority to regulate activities occurring on tribal lands, whether by tribal members or not, has a long and complex legal history, involving considerations of whether state regulation is preempted by federal regulation, whether state regulation is consistent with tribal sovereignty and self-determination, and whether tribes have consented to state jurisdiction, either in treaties or pursuant to the Indian Civil Rights Act of 1968.⁹⁰ In addition, Indian law jurisprudence finds state law generally inapplicable when states attempt to regulate the conduct of Indians directly within reservation boundaries.⁹¹

41. We recognize that some state commissions have asserted jurisdiction over carriers seeking to provide service on tribal lands and regulate certain aspects of the provision of telecommunications service on tribal lands. We seek comment, in particular from state commissions as well as any other interested parties, concerning the extent of state and tribal regulation of telecommunications provided on tribal lands and by tribally-owned or operated carriers. In particular, we seek comment on the appropriate jurisdictional authority in the following situations: (1) tribally-owned or operated carriers providing service within the reservation (a) to tribal members, (b) to non-tribal members, and (c) to non-tribal members living on non-native fee lands (within the reservation); (2) non-tribally owned or operated carriers offering service both inside and outside of the reservation; and (3) tribally-owned or operated carriers offering service outside of the reservation. We refer parties commenting on these issues

⁸⁹ *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973).

⁹⁰ 18 U.S.C. §§ 1321, 1322, 1326 (1976). Among other things, the Indian Civil Rights Act provides for the Constitutional rights of Indians (including the provisions contained in the Bill of Rights of the United States Constitution) and establishes jurisdiction over criminal and civil actions.

⁹¹ *See White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144 (1980).

to the various ways in which tribal lands could be defined, as discussed below, and seek comment on how these definitions inform the jurisdictional analysis requested in this section.⁹²

42. In addition, we seek comment on the jurisdictional treatment of the following geographic entities, as classified by the Bureau of the Census:⁹³ (1) American Indian Reservations, which are areas with boundaries established by treaty, statute and /or executive or court order; (2) Trust Lands, which are real property held in trust by the federal government that is associated with a specific American Indian reservation or tribe and which may be located within or outside the reservation; (3) Tribal Jurisdiction Statistical Areas, which are delineated by those Federally-recognized tribes in Oklahoma that no longer have a reservation; (3) Tribal Designated Statistical Areas, which encompasses federally and state-recognized tribes without reservation or trust lands; (4) Alaska Native Regional Corporations, which are corporate entities established under the Alaska Native Claims Settlement Act of 1972 (ANCSA) to conduct the commercial and nonprofit business of Alaska Natives;⁹⁴ and (5) Alaska Village Statistical Areas, which are tribes, bands, clans, groups, villages, communities, or associations in Alaska that are recognized pursuant to the ANCSA.

43. We seek comment on whether there are any other kinds of tribal relationships that would inform our jurisdictional analysis. We seek comment on whether the state commission has jurisdiction over telecommunications in the situations described above, the legal authority for such jurisdiction (*e.g.* the state constitution, state statute, Indian treaty, etc.); and the extent to which the particular state commission exercises that jurisdiction. We also seek comment on the existence of any concurrent jurisdiction.

44. In addition, we observe that wireline telephone calls between Indian tribal lands and the state in which tribal land is located are currently treated as intrastate calls, subject to state jurisdiction. We seek comment on whether this treatment is consistent with principles of tribal sovereignty and the Indian law jurisprudence regarding the limits of state authority, referenced above. We also seek comment on whether the treatment of these calls as intrastate is consistent with the division of jurisdiction between the Commission and the states under section 2 of the Act. We seek comment as well on the need, impact, and Commission's authority to reclassify these calls as interstate for the purpose of giving effect to principles of tribal sovereignty.

45. We observe further that state jurisdiction may be preempted by the operation of federal law "if it interferes with or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state

⁹² See section III.B.

⁹³ The Geographic Areas Reference Manual describes in great detail the basic geographic entities the Census Bureau uses in its various data tabulations and documents the purposes, definitions, standards, criteria, and procedures used to select, define, delineate, and revise these geographic entities. See <http://www.census.gov/geo/www/garm.html>. To view or download the Census Bureau's listing of the American Indian and Alaska Native Areas by State in 1990, go to <http://www.census.gov/ftp/pub/geo/www/GARM/Ch5GARM.pdf>. Land Area and Poverty Data for American Indian and Alaska Native Areas can be viewed at: <http://www.census.gov/geo/www/ezstate/aianapov.html>. For more recent information, see Veronica E. Velarde Tiller, Tiller Research, Inc., *American Indian Reservations and Trust Areas* (prepared under an award from the Economic Development Administration, U.S. Department of Commerce, 1996).

⁹⁴ Public Law 92-203, as amended by Public Law 94-204.

authority.”⁹⁵ An express Congressional statement of preemption is not required.⁹⁶ Instead, a preemption analysis “requires a particularized examination of the relevant state, federal and tribal interests.”⁹⁷ We seek comment on state interests in regulating telecommunications on tribal lands, including the ability to ensure reasonable rates, quality service, and the continued viability of local exchange carriers (LECs). We also seek comment from each tribal government, and any other interested parties, on the extent to which the state’s exercise of jurisdiction over telecommunications on tribal lands and over tribal carriers that serve areas both inside and outside Indian sovereign territory is warranted.

46. *Tribal Regulation.* We seek comment from each tribal government, and any other interested parties, on the extent of tribal authority over regulation of telecommunications on tribal lands. As a threshold matter, we note that the Commission has previously spoken to some aspects of this issue in the *A.B. Fillins Order*, in which the Commission considered the extent of tribal regulatory authority over the provision of cellular service within a tribal reservation.⁹⁸ In that order, the Commission held that under well-settled case law, the Communications Act applies with equal force to tribal reservations as to other areas, and that the Commission has sole authority under Title III of the Act with respect to management and licensing of radio spectrum in tribal areas.⁹⁹ The Commission also concluded, however, that the Communications Act does not preempt tribal authority over access by telecommunications carriers to tribal lands, because the provisions of the Act that preempt state and local impediments to entry do not apply to tribal authorities.¹⁰⁰

47. In light of this statutory framework, we seek comment on the current extent to which tribal authorities have engaged in telecommunications regulation and on any future plans of tribal authorities to regulate telecommunications in tribal areas. We seek comment on the extent to which tribal authorities consider regulation of tribal telecommunications important to the right to self-government and self-determination. We also seek comment on whether tribal authorities should be considered as comparable to state authorities for purposes of regulating telecommunications services, and the degree to which the federal-tribal relationship on communications matters is similar or dissimilar to the federal-state relationship. Finally, while we have determined in the *A.B. Fillins Order* that tribal authorities are not subject to preemption under provisions of the Act applicable to state and local governments, we seek comment on what

⁹⁵ *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983), citing *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144 (1980).

⁹⁶ *Id.*

⁹⁷ *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176 (1989), citing *Ramah Navajo School Bd., Inc. v. Bureau of Revenue*, 458 U.S. 832, 838 (1982).

⁹⁸ AB Fillins: Petition for a Declaratory Ruling Preempting the Authority of the Tohono O’odham Legislative Council to Regulate the Entry of Commercial Mobile Radio Service to the Sells Reservation Within the Tucson MSA, Market No. 77, *Memorandum Opinion and Order*, 12 FCC Rcd 11755 (1997) (*AB Fillins Order*).

⁹⁹ *Id.* at paras. 30-32 (citing *United States v. Farris*, 624 F.2d 890 (9th Cir. 1980), *cert. denied sub nom. Baker v. United States*, 449 U.S. 1111 (1981)).

¹⁰⁰ *AB Fillins* at paras. 16-18 (finding that the tribal legislative council’s decision to prevent the location of cell sites on reservation lands is within its authority over the occupation and use of tribal lands and is not preempted by Section 253 or Section 332(c) of the Act).

authority, if any, the Commission has to preempt tribal regulations that may be inconsistent with our federal regulatory scheme.

48. *Tribal Self-determination and Universal Service Goals.* We seek comment to determine how principles of Indian law and federal support for tribal self-determination affect the Commission's statutory mandate to ensure that consumers in all regions of the nation have access to the services supported by federal universal service support mechanisms. Pursuant to the Act, the Commission is bound by its statutory mandate to promote the availability of the services supported by federal universal service support mechanisms in all regions of the Nation.¹⁰¹ We seek comment on whether this statutory obligation is affected or constrained by any contrary interests, for cultural or other reasons, of certain tribal authorities. We seek comment, in particular from tribal authorities, to ascertain whether tribal authorities share the goals established by the 1996 Act, which the Commission is bound to implement. We seek comment on the extent to which tribal authorities seek to promote the availability of telecommunications services and competition among telecommunications providers.

49. We also seek comment on whether the services supported by federal universal service support mechanisms are consistent with the interests of tribal authorities in promoting service in tribal lands.¹⁰² We recognize that some tribal authorities may prefer a different mix of services to be supported. For example, some tribes may prefer support for terrestrial wireless or satellite services, rather than wireline services. Other tribes may want to prioritize the ability for each member to receive basic telecommunications service, rather than the entire package of services included in the definition of universal service. We seek comment on whether the Commission has the authority to and whether it should develop a procedure by which the Commission, the Joint Board and the sovereign Indian tribes could identify a single alternative definition of the services supported by federal universal service support mechanisms in tribal lands. We seek comment on additional administrative burdens that would be associated with implementing this procedure.

B. Defining "Tribal Lands"

50. The definition we adopt of "tribal lands" will be used to identify those areas in which, for reasons based on principles of Indian sovereignty, the Commission seeks comment to determine whether possible modifications to our federal universal service policies and rules may be warranted. In defining tribal lands, we seek to ensure that we limit the reach of these proposals to those areas in which principles of tribal sovereignty and tribal self-determination apply. We also seek to balance the reasonable exercise of federal jurisdiction with appropriate deference to state sovereignty and jurisdiction.

51. We seek comment on defining tribal lands as all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation. Alternatively, we seek comment on defining tribal lands to have the same meaning as the term "Indian country," as that term is defined by the Bureau of Indian Affairs. "Indian country" means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government,

¹⁰¹ 47 U.S.C. § 254(b)(3).

¹⁰² See n. 34, *supra*.

notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.¹⁰³

52. In addition, we seek comment on whether the geographic entities, as classified by the Bureau of the Census, should be included in the definition of tribal lands:¹⁰⁴ (1) American Indian Reservations, which are areas with boundaries established by treaty, statute and / or executive or court order; (2) Trust Lands, which are real property held in trust by the federal government that is associated with a specific American Indian reservation or tribe and which may be located within or outside the reservation; (3) Tribal Jurisdiction Statistical Areas, which are delineated by those Federally-recognized tribes in Oklahoma that no longer have a reservation; (3) Tribal Designated Statistical Areas, which encompasses federally and state-recognized tribes without reservation or trust lands; (4) Alaska Native Regional Corporations, which are corporate entities established under the ANCSA¹⁰⁵ to conduct the commercial and nonprofit business of Alaska Natives;¹⁰⁶ and (5) Alaska Village Statistical Areas, which are tribes, bands, clans, groups, villages, communities, or associations in Alaska that are recognized pursuant to the ANCSA.

53. We observe that, with the exception of the first category, American Indian Reservations, the above listed classifications used by the Bureau of the Census would not be encompassed in a definition of tribal lands that is limited to “all land within the limits of any Indian reservation under the jurisdiction of the United States Government,” as set forth above. We recognize that tribes encompassed by these classifications may face obstacles in obtaining telecommunications services that are similar to those faced by tribes in living in American Indian Reservations. Commenters supporting the inclusion of any of these categories should explain the source of the Commission’s authority to implement the additional measures proposed in this item with respect to these areas, including noting any jurisdictional arguments provided in response to questions raised in section III.A.2.

¹⁰³ 18 U.S.C. § 1151. The term “dependent Indian communities” refers to a limited category of Indian lands that are neither reservations nor allotments, that have been set aside by the federal government for the use of Indians as Indian land, and that are under federal superintendence. *Alaska v. Native Village of Venetie Tribal Government*, 118 S.Ct. 948, 953 (1998). Although Congress initially defined the term “Indian country” for purposes of federal criminal jurisdiction, the Supreme Court has recognized that the term also applies to questions of civil jurisdiction. *Alaska v. Native Village of Venetie Tribal Government*, 118 S.Ct. at 952, n.1; *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 208, n.5 (1987); *DeCoteau v. District County Court*, 420 U.S. 425, 427, n.2 (1975).

¹⁰⁴ See n. 93 for references to information identifying the specific tribes included within these classifications.

¹⁰⁵ See para. 21.

¹⁰⁶ Public Law 92-203, as amended by Public Law 94-204.

C. High-Cost Support Mechanisms

1. Background

54. In 1984, the Commission established high-cost support mechanisms to promote the nationwide availability of telephone service at reasonable rates.¹⁰⁷ The high-cost loop fund provides support by allowing incumbent LECs with higher than average local loop costs to allocate an additional portion of those costs to the interstate jurisdiction to be recovered from interstate revenues.¹⁰⁸ This enables the state jurisdictions to establish lower local exchange rates in study areas receiving such assistance.¹⁰⁹ In general, a study area corresponds to an incumbent LEC's entire service territory within a state.¹¹⁰ Typically for incumbent LECs operating in more than one state, each state represents a study area.

55. Pursuant to existing support mechanisms, high-cost loop support for most incumbent LECs is calculated using data provided by incumbent LECs pursuant to the Commission's cost accounting and jurisdictional separations rules.¹¹¹ Non-rural carriers are scheduled to make the transition on January 1, 2000 to a new support mechanism based on forward-looking costs, while rural carriers will continue to receive support based on the existing mechanisms until at least January 1, 2001. Under the existing mechanisms, the amount of an incumbent LEC's high-cost loop support is based on the relationship of its historical loop cost for a particular study area to the national average loop cost. In order to determine this relationship, approximately half of all incumbent LECs submit their historical loop cost data to NECA each year pursuant to sections

¹⁰⁷ See generally *Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board*, CC Docket No. 80-286, 96 FCC 2d 781 (1984). Pursuant to the Commission's directive, the local exchange carriers formed NECA to administer the high-cost support mechanisms. The support mechanisms include the high-cost loop fund, Dial Equipment Minutes (DEM) weighting assistance support and Long Term Support. The Commission's DEM weighting assistance mechanism provides support for local switching costs to telephone companies with 50,000 or fewer access lines. Initially, support was provided by allowing carriers to allocate a greater portion of their switching costs to the interstate jurisdiction. These costs were recovered through interstate access charges. In the *First Report and Order*, the Commission modified the program to provide that support attributable to DEM weighting would be recovered through the new universal service support mechanism. See *First Report and Order*, 12 FCC Rcd at 8940-4; 47 C.F.R. § 54.301. Long Term Support (LTS) refers to the support given to some carriers to supplement the part of the interstate portion of their local loop costs recovered through the Carrier Common Line (CCL) charge. LTS allows LECs with higher-than-average loop costs to charge only an average CCL rate. In the *First Report and Order*, the Commission determined that until carriers begin to receive support based on the new high-cost mechanism, LTS would be computed for each incumbent LEC using a baseline level of LTS derived from 1997 historical cost data but adjusted each year to reflect the annual percentage change in the nationwide average cost per loop and inflation. See 47 C.F.R. § 54.303.

¹⁰⁸ See 47 C.F.R. § 36.611.

¹⁰⁹ *Id.*

¹¹⁰ 47 C.F.R. § 36 app. (defining "study area"); 47 U.S.C. § 251(h) (defining incumbent local exchange carrier). See *MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, Recommended Decision and Order*, 49 Fed. Reg. 48325 (Dec. 12, 1984); *Decision and Order*, 50 Fed. Reg. 939 (Jan. 8, 1985); see also *Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, Notice of Proposed Rulemaking*, 5 FCC Rcd 5974 (Oct. 10, 1990).

¹¹¹ See 47 C.F.R. Parts 36 and 69.

36.611 and 36.612 of the Commission's rules.¹¹² Because the cost data is not submitted by carriers until seven months after the end of a calendar year, and because NECA requires time to analyze the data and make the necessary nationwide calculations of support, carriers generally do not receive high-cost support based on these data until the beginning of the second calendar year after costs are incurred. The impact of this rule is mitigated, however, by section 36.612 of the rules, which allows carriers to update on a quarterly basis the calendar year data that they submit to NECA on July 31 of each year.¹¹³

56. The remainder of incumbent LECs, known as "average schedule companies," are not required to perform jurisdictionally-separated cost studies.¹¹⁴ Average schedule treatment historically has been available to companies that are presumed, because of their small size, to lack the resources to justify a requirement that they perform separations and access charge cost studies to determine their compensation from interstate services.¹¹⁵ NECA develops a schedule based on generalized industry data to reflect the costs of a typical small incumbent LEC. Subject to Commission approval, NECA's average schedule formula is used to provide support to average schedule companies.¹¹⁶

57. *Study Area Freeze.* The Commission froze all study area boundaries effective November 15, 1984 to curtail the ability of incumbent LECs to place high-cost exchanges within their existing service territories in separate study areas to maximize the payments from the universal service support mechanisms.¹¹⁷ As a result, an incumbent LEC must apply to the Commission for a waiver of the study area boundary if it wishes to sell or purchase an exchange.¹¹⁸

¹¹² Incumbent LECs must submit account data to the Administrator for each of its study areas. See 47 C.F.R. § 36.611, 36.612.

¹¹³ See 47 C.F.R. § 36.612. If a carrier files a quarterly update, NECA recalculates the carrier's high-cost support for the remainder of the year based on the updated data (e.g., data covering the last nine months of the previous calendar year and the first three months of the current calendar year), rather than the calendar year data submitted on July 31. Thus, the quarterly update provision allows carriers to receive support earlier than the beginning of the second calendar year after costs are incurred.

¹¹⁴ Section 69.605(c) of the Commission's rules defines an average schedule company as "a telephone company that was participating in average schedule settlements on December 1, 1982." 47 C.F.R. § 69.605(c). Prior to the adoption of the Commission's access charge rules in 1984, incumbent LEC compensation arrangements were handled through private contractual agreements within the telephone industry. The industry's settlement mechanism based the amount of incumbent LEC compensation either on cost studies or average schedule formulas that were used to estimate an incumbent LEC's cost of service. To facilitate implementation of its access charge rules, the Commission incorporated a modified version of the industry's existing average schedule arrangement. See *Proposed MTS and WATS Market Structure*, Third Report and Order, CC Docket No. 78-72, Phase I, 93 FCC 2d 241 (1983) (*Average Schedule Order*). See also *National Exchange Carrier Association, Inc. Proposed Modifications to the 1997 Interstate Average Schedule Formulas*, Order on Reconsideration and Order, AAD 97-2, DA 97-2710 at para. 3 (Comm. Carr. Bur. rel. Dec. 24, 1997).

¹¹⁵ See *Average Schedule Order*, *supra* n. 114.

¹¹⁶ These average schedule companies may convert to "cost companies" and receive compensation from NECA based on their company-specific costs. Once they make this election, however, they cannot later resume average schedule status. See 47 C.F.R. § 69.605(c).

¹¹⁷ *Id.*

¹¹⁸ The Commission requires carriers to petition for a waiver whenever a company seeks to create or reconfigure study areas except under three conditions: (a) a separately incorporated company is establishing a study